(2) (2)

Supreme Court, U.S.
FILED
JUL 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1918 and No. 86-1894

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

ALIOTO & ALIOTO, et al.,
Petitioners,

DONALD A. BARTON,
Petitioner,

VS.

E. F. HUTTON & CO., INC., et al.,
Respondents.

JOINT AND CONSOLIDATED BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

C. STEPHEN HOWARD
Counsel of Record
WAYNE STEPHEN BRAVEMAN
SUSAN L. HOFFMAN
TUTTLE & TAYLOR INCORPORATED
355 South Grand Avenue
Los Angeles, Calif. 90071
(213) 683-0600

Attorneys for Respondent Donaldson, Lufkin & Jenrette Securities Corporation

C. G. GORDON MARTIN
PAUL A. RICHLER
JUDITH K. OTAMURA-KESTER
MORGAN, LEWIS & BOCKIUS
801 South Grand Avenue
Los Angeles, Calif. 90017
(213) 612-2500

Attorneys for Respondents E. F. Hutton & Co., Inc. Richard Jacoby and Haim Pekalis

BEN SUTER
TERRY ROSS
KEESAL, YOUNG & LOGAN
455 The Embarcadero
San Francisco, Calif. 94111
(415) 989-0616

Attorneys for Respondents, Shearson/American Express, Inc. and Oppenheimer & Co., Inc.

FRANK KAPLAN
ALSCHULER, GROSSMAN & PINES
1880 Century Park East
Los Angeles, Calif. 90067
(213) 277-1226

Attorneys for Respondents, Kurt Feshbach and Stockbridge Partners, Inc.

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600

QUESTIONS PRESENTED

The petitions for certiorari in this case raise two separate and distinct issues.

1. *In No. 86-1918:* Whether the Ninth Circuit's unanimous decision affirming the district court's award of sanctions under Fed. R. Civ. P. 11 against an attorney for failing to make a "reasonable inquiry" into whether a class action complaint under the federal securities laws was "well grounded in fact" is appropriate for review by this Court, when it: (a) rests on findings of fact by the district court, unanimously affirmed by the Court of Appeal, that are not subject to review by this Court; (b) involves no important questions of federal law; and (c) involves application of well-settled law under Rule 11 as to which there is no conflict among the circuits.

2. *In No. 86-1918 and No. 86-1894:* Whether the Ninth Circuit's unanimous ruling that the district court's imposition of conditions on the granting of plaintiffs' motion for dismissal without prejudice pursuant to Fed. R. Civ. P. 41(a)(2) is not appealable is appropriate for review by this Court when: (a) as the Ninth Circuit found, petitioners elected below to acquiesce in the conditions; (b) as the Ninth Circuit ruled, petitioners may seek review by way of petition for writ of mandamus; (c) the Ninth Circuit's ruling raises no important questions of federal law; and (d) the Ninth Circuit's ruling involves no conflict among the circuits.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement of the Case	1
A. Events Prior To The Filing Of The Complaint	3
B. The Complaint	4
C. Alioto's Failure To Investigate Prior To Filing The Complaint	5
D. Events Subsequent To The Filing Of The Complaint	7
E. The Decisions Below	9
Summary of Reasons for Denying the Writs	12
A. Certiorari Should Be Denied In No. 86-1918 As To The Rule 11 Sanctions	12
B. Certiorari Should Be Denied In No. 86-1894 And No. 86-1918 As To The Rule 41(a)(2) Conditions	13
Reasons for Denying the Writs	14
A. Review Should Be Denied In No. 86-1918 Because The Rule 11 Sanctions Involve Fact-Based Application of Well-Settled Law Which Raises No Important Questions of Federal Law and As To Which There Is No Conflict Among the Circuits	14
1. The Rule 11 sanctions involve fact-based application of well-settled law raising no important questions of federal law	14
2. There is no conflict among the circuits on any Rule 11 issue in this case	20

TABLE OF CONTENTS

Page

B. Review Should Be Denied In No. 86-1894 and No. 86-1918 Because The Ruling That The Rule 41(a)(2) Conditions In This Case Are Not Appealable Raises No Important Questions of Federal Law and Involves No Conflict Among the Circuits 23

1. The ruling that the Rule 41(a)(2) conditions in this case are not appealable does not raise any important questions of federal law 24

2. The ruling that the Rule 41(a)(2) conditions in this case are not appealable does not involve a conflict among the circuits 26

Conclusion 28

TABLE OF AUTHORITIES CITED

Cases

Page

Albright v. Upjohn Co., 788 F.2d 1217 (6th Cir. 1986) 15, 20, 21, 22, 23

Blackwell v. Department of Offender Rehabilitation, 807 F.2d 914 (11th Cir. 1987) 22

Bowers v. St. Louis Sw. Ry. Co., 668 F.2d 369 (8th Cir. 1981), *cert. denied*, 456 U.S. 946 (1982) ... 26

Eastway Construction Co. v. City of New York, 762 F.2d 243 (2d Cir. 1985) 20, 21

Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985) ... 15

Frazier v. Cast, 771 F.2d 259 (7th Cir. 1985) 15, 20

G.A.F. Corp. v. Transamerica Insurance Co., 665 F.2d 364 (D.C. Cir. 1981) 24, 26

Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986), *rehearing and rehearing en banc denied*, 809 F.2d 584 (9th Cir. 1987) 22, 23

Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949) 16

Lau v. Glendora Unified School District, 792 F.2d 929 (9th Cir. 1986) 24, 25

LeCompte v. Mr. Chip Inc., 528 F.2d 601 (5th Cir. 1976) 25, 26

Lieb v. Topstone Industries, 788 F.2d 151 (3d Cir. 1986) 20, 21

McLaughlin v. Bradlee, 602 F.Supp. 1412 (D.D.C. 1985), *aff'd*, 803 F.2d 1197 (D.C. Cir. 1986) ... 20

McLaughlin v. Cheshire, 676 F.2d 855 (D.C. Cir. 1982) 24, 26

Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1373 (1987) 22, 23

Quiros v. Hernandez Colon, 800 F.2d 1 (1st Cir. 1986) 22

Robinson v. National Cash Register, 808 F.2d 1119 (5th Cir. 1987) 20, 21

TABLE OF AUTHORITIES CITED

Cases

	Page
Rodgers v. Lincoln Towing Service, Inc., 771 F.2d 194 (7th Cir. 1985)	20
Scholl v. Felmont Oil Corp., 327 F.2d 697 (6th Cir. 1964)	26
Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783 (5th Cir. 1986)	18, 19
Stevens v. Lawyers Mutual Liability Insurance Co., 789 F.2d 1056 (4th Cir. 1986)	20
Suslick v. Rothschild Securities Corp., 741 F.2d 1000 (7th Cir. 1984)	20
Thomas v. Capital Securities Services, Inc., 812 F.2d 984 (5th Cir. 1987)	18, 19, 22
United States v. Doe, 465 U.S. 605 (1984)	16
United States v. Winans, 612 F.Supp. 827 (S.D.N.Y. 1985), *aff'd in part and reversed in part sub nom. United States v. Carpenter*, 791 F.2d 1024 (2d Cir.), *cert. granted*, 107 S. Ct. 666 (1986)	3
Westmoreland v. CBS, Inc., 770 F.2d 1168 (D.C. Cir. 1985)	15, 17, 20, 21
Yagman, In re Matter of, 796 F.2d 1165, *rehearing denied and amended*, 803 F.2d 1085 (9th Cir. 1986)	19
Yoffe v. Keller Industries, Inc., 580 F.2d 126, *rehearing denied*, 582 F.2d 982 (5th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979)	25, 26, 27
Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986)	15, 17, 20, 21

Rules

Federal Rules of Civil Procedure, Rule 11 ..... *passim*

Federal Rules of Civil Procedure, Rule 23(a) 5, 19

Federal Rules of Civil Procedure, Rule 23(e) 8

Federal Rules of Civil Procedure, Rule 41(a)(1) 8

TABLE OF AUTHORITIES CITED

Rules

	Page
Federal Rules of Civil Procedure, Rule 41(a)(2)	*passim*
Local Rules of the United States District Court for the Central District of California, Rule 18.4	7
Local Rules of the United States District Court for the Central District of California, Rule 18.5	8
Rules of the Supreme Court of the United States, Rule 17	12
Rules of the Supreme Court of the United States, Rule 17.1	23

Miscellaneous

Advisory Committee Notes to Federal Rules of Civil Procedure, Rule 11	16, 17, 19
Nelkin, *Sanctions Under Amended Rule 11 — Some "Chilling Problems" in the Struggle Between Compensation and Punishment,* 74 Geo. L. J. 1313, 1339-41 (1986)	18

No. 86-1918 and No. 86-1894

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

ALIOTO & ALIOTO, et al.,
Petitioners,
DONALD A. BARTON,
Petitioner,
vs.
E. F. HUTTON & CO., INC., et al.,
Respondents.

JOINT AND CONSOLIDATED BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Respondents respectfully request this Court to deny the petitions, in No. 86-1918 and No. 86-1894, for writs of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

In this action, District Judge Pamela A. Rymer, unanimously affirmed by the Ninth Circuit in an opinion by Circuit Judge Clifford A. Wallace (joined by Circuit Judges Jerome Farris and William C. Canby), imposed sanctions against petitioner Alioto & Alioto ("Alioto") under Fed. R. Civ. P. 11 ("Rule 11") based on Alioto's filing, without the requisite "reasonable inquiry," of class action claims not "well grounded in fact." In *No. 86-1918*, Alioto seeks review of the Rule 11 sanctions.

Separately and independently, as a condition to plaintiffs' belated effort voluntarily to dismiss those class action claims and certain individual claims without prejudice — thereby depriving respondents of a favorable adjudication on the merits and preserving plaintiffs' option to sue again — Judge Rymer required pursuant to Fed. R. Civ. P. 41(a)(2) ("Rule 41(a)(2)") that plaintiffs pay respondents their reasonable attorneys' fees and costs incurred in defending against the class action claims. The Ninth Circuit found that plaintiffs had acquiesced in the conditions by failing to withdraw their motion for dismissal without prejudice, and ruled the conditions non-appealable. In *No. 86-1894,* petitioner Donald A. Barton ("Barton") seeks review of this holding, as do petitioners in *No. 86-1918.*

Contrary to petitioners' arguments, which rely on wholesale mischaracterizations of the record, the Rule 11 sanctions rest squarely on the district court's extensive factual findings, unanimously affirmed by the Ninth Circuit, regarding Alioto's unquestioned misconduct and on application of well-settled principles of law under Rule 11. And the Rule 41(a)(2) conditions imposed on plaintiffs' dismissal without prejudice of their class action claims follow settled precedent recognizing that such conditions are appropriate to compensate defendants for the fact that they are foreclosed from obtaining a favorable adjudication on the merits, and for work done in defense of the plaintiff's claims which will not prove useful if and when those claims are reasserted in another action. As the Ninth Circuit ruled, particularly where, as here, a plaintiff acquiesces in such conditions, the imposition of conditions is not appealable, but review may be sought by petition for writ of mandamus.

To correct petitioners' misstatements, respondents summarize below the facts as found by the district court

and affirmed by the Ninth Circuit, and the grounds for the decisions below.

A. Events Prior To The Filing Of The Complaint.

During 1983, fueled by a series of optimistic public announcements by the company, the publicly traded stock of petitioner Unioil, Inc. ("Unioil") rose from $1.25 per share in the early part of the year to a high of $13.75 per share in mid-December 1983. In February 1984, Unioil's stock was trading at $10.00 per share. App. A2, B1.* On February 7, 1984, the Wall Street Journal published an article raising serious doubts about the accuracy of the company's public announcements, suggesting that Unioil was being investigated by the Securities and Exchange Commission ("the SEC"), and disclosing that Unioil's principal executive, plaintiff Melvin Lloyd Richards ("Richards"), had twice previously been cited by the SEC for making false and misleading statements.[1] Commencing shortly before publication of the article, Unioil's stock ultimately tumbled from $10.00 per share to $2.625 per share. App. A2, B2.

The disclosures in the Wall Street Journal article made highly likely — as subsequently occurred — the filing of

---

*The Petition in No. 86-1918 is cited as "Alioto Pet.," and the Petition in No. 86-1894 as "Barton Pet." The Appendices to the Alioto Petition are cited as "App. ____," and the Appendices to the Barton Petition as "Barton App. ____."

[1]Alioto falsely states that the author of the Wall Street Journal article, R. Foster Winans, was later convicted of securities fraud for disseminating false information in his articles. Winans was in fact convicted for disclosing *true* information to traders just prior to the publication of that information. *United States v. Winans*, 612 F. Supp. 827, 838 (S.D.N.Y. 1985), *aff'd in part and rev'd in part sub nom. United States v. Carpenter*, 791 F.2d 1024 (2d Cir.), *cert. granted*, 107 S.Ct. 666 (1986). Winans has never been accused of any wrongdoing in connection with the Unioil article.

shareholder class action lawsuits against Unioil and its management. *See* App. A4, A14, B7-B8, B9-B10. In what now appears to have been an effort to forestall such lawsuits, on February 22, 1984, Unioil issued a press release announcing that it and a group of its shareholders had retained Alioto to institute a class action lawsuit alleging that the decline in Unioil's stock was due to market manipulation by a group of national brokerage firms and individuals associated therewith (respondents herein). App. A3, B2. Alioto is, and represented itself in this action as, experienced and specialized in complex business litigation. App. A12, B5, B9.

B. The Complaint.

The class action complaint was filed one month subsequent to the press release, on March 21, 1984. App. A2, B3. Named as plaintiffs were Unioil, Richards, petitioners Heck Oil Co. ("Heck Oil") and Heck & Heck, Inc. ("Heck & Heck"), along with petitioner Mark Zelezny ("Zelezny"). App. A2. Heck Oil and Heck & Heck were major shareholders of Unioil, and, as Alioto had reason to know, closely aligned with Unioil management. App. A2, A14, B5.[2] Zelezny was a stockbroker and shareholder of Unioil. App. A2, B2. Attorneys of record were Alioto and Barton. Alioto signed the complaint. App. A2, B3.

The complaint pled all of its substantive legal claims (except for a defamation claim brought individually by Unioil and Richards) as claims on behalf of a class of Unioil shareholders, and all plaintiffs — Unioil, Richards, Heck Oil and Heck & Heck, as well as Zelezny — were alleged to be representatives of the putative class. App.

---

[2]As Judge Rymer found, it was at Heck Oil's and Heck & Heck's suggestion that Unioil and Richards contacted Alioto, and it was Heck Oil and Heck & Heck who posted the $100,000.00 retainer required by Alioto. App. B5.

A2, B5, B9. The complaint alleged that, in violation of federal securities laws: (a) respondents had illegally depressed the price of Unioil stock between December 1, 1983 and February 25, 1984 by selling the stock short and by spreading false negative rumors about Unioil; (b) plaintiffs had been induced by respondents' alleged false statements to sell their Unioil stock and did so at depressed prices; and (c) plaintiffs had sold their Unioil stock in reliance on respondents' alleged statements. App. A2, A3, B4-B5. The complaint also alleged federal antitrust and RICO claims, and claims for fraud and deceit under California law (which again specifically pled plaintiffs' reliance on respondents' alleged statements). Damages in excess of $50,000,000.00 were sought. App. A2, A3, A12, A16, B4-B5.

C. Alioto's Failure To Investigate Prior To Filing The Complaint.

Because Zelezny was the only named plaintiff with the appearance of independence from Unioil and its management, Zelezny's role in this class action litigation was critical. App. A2. As both Judge Rymer and the Ninth Circuit found, any reasonably competent business attorney would have realized, upon reading the Wall Street Journal article, the strong possibility that Unioil shareholders would sue Unioil and its management, and thus at a minimum have taken steps to investigate and insure that any class claims were represented by a plaintiff independent of Unioil and otherwise qualified under Fed. R. Civ. P. 23(a). App. A14, B9-B10. Indeed, within three weeks of the filing of this action, three separate class action lawsuits were filed by Unioil shareholders against Unioil and its management (including Richards). Each action accused Unioil's management of inflating the price of Unioil stock by making false optimistic announcements about the company. App. A4, B6, B9.

But as Judge Rymer and the Ninth Circuit found, Alioto did not so investigate. Alioto's description of the purported nature and extent of its pre-filing investigation, Alioto Pet. at 6-8, has no support in the record, and is belied by Judge Rymer's factual findings, affirmed by the Ninth Circuit.[3]

Despite a substantial retainer, ample time for investigation, and the fact that it was experienced and specialized in complex business litigation, App. A12, B5, B8, prior to filing the complaint, Alioto did *not* consider the obvious conflict inherent in simultaneously representing both Unioil and its management and a putative class of Unioil shareholders -- much less the impropriety of asserting class claims with Unioil, its management and closely related entities Heck Oil and Heck & Heck as class representatives. App. A14, B8. Moreover, before filing the complaint, Alioto *never* spoke to Zelezny, the only named plaintiff even arguably independent from Unioil and its management; nor did it inquire whether Barton had investigated Zelezny's suitability as a class

---

[3]Thus, there is no basis in the record for Alioto's putative factual assertions that prior to filing the complaint, Alioto held meetings with certain of the plaintiffs (not including Zelezny), reviewed "voluminous documents," explored the possibility that corporate mismanagement might have explained the drop in Unioil's stock, or "received a large favorable response from shareholders wishing to join the action against the brokers." Alioto Pet. at 7-8. Similarly, there is no record support for Alioto's putative factual assertions regarding: (1) Richards' knowledge and Heck Oil's and Heck & Heck's principal Mr. Thomas Heckenkamp's knowledge of alleged concerted short-selling of Unioil stock; (2) the trading volumes of Unioil stock during the relevant time period; or (3) respondent Feshbach's alleged letters regarding trading in Unioil stock. *Compare* Alioto Pet. at 6-8 (putative factual assertions) *with* App. B8, A1-A5 (district court ruled any such "evidence" inadmissible, and district court's findings of fact affirmed and recited by the Ninth Circuit did not include these putative "facts").

representative. App. A3, A12-A13, B2-B3, B7, B8. All Alioto knew about Zelezny at the time it filed the complaint was that, as Alioto learned from Barton, Zelezny had sold Unioil stock the day after the Wall Street Journal article appeared. App. A3, A12-A13, C3.

D. Events Subsequent To The Filing Of The Complaint.

As required by Central District Local Rule 18.4 (requiring completion of class action discovery within sixty days of the filing of a complaint), respondents immediately initiated an expedited program of discovery on class certification issues. App. B3. On the second day of Zelezny's deposition, Zelezny failed to appear.[4] Instead, Barton announced that Zelezny was withdrawing as a plaintiff. The magistrate ordered Zelezny to complete his deposition, and imposed sanctions. App. A3, B3.

At his resumed deposition, Zelezny flatly contradicted the essential allegations of the complaint. App. A3, B4. Thus:

(1) While the complaint alleged that respondents' alleged short selling had driven down the price of Unioil stock and caused plaintiffs to sell Unioil shares at depressed prices, Zelezny, a professional stockbroker, testified that he was aware of significant short selling in Unioil stock and, following a contrary strategy, *bought not sold*

---

[4]Alioto obscures the circumstances surrounding the Zelezny deposition. Alioto fails to mention that: (1) Alioto never questioned Zelezny or Barton to determine whether or not Zelezny was an appropriate plaintiff or class representative; (2) Zelezny's deposition testimony directly contradicted the allegations of the complaint; (3) the Zelezny deposition took place before any effort by plaintiffs to dismiss their claims without prejudice; and (4) Zelezny sought to escape questioning by refusing to appear for the second day of his deposition. *Compare* Alioto Pet. at 9-10 (purported facts) *with* App. B3-B4 (facts as found by district court) *and id.* A3-A4 (facts affirmed by Ninth Circuit).

Unioil shares, based on his belief that the short sellers would have to buy and eventually drive up the stock price. App. A3, B4.

(2) While the complaint alleged that sales of Unioil stock made by plaintiffs between December 1, 1983 and February 29, 1984 had been at *depressed* prices, Zelezny testified that the price that prevailed during this period, until the February 7, 1984 Wall Street Journal article, was in his view the *fair market price* of the stock. App. A3, B4.

(3) While the complaint alleged that plaintiffs had engaged in Unioil stock transactions in *reliance* on false, negative statements by respondents, Zelezny testified that he had heard no negative statements or rumors about Unioil, false or otherwise, from respondents or anyone else, prior to the Wall Street Journal article, and that he had *never bought or sold Unioil stock in reliance on anything said by any respondent.* App. at A3, B4-B5.

Zelezny's deposition was scheduled for another session on May 15, 1984. On May 14, 1984, Barton announced that Zelezny would once again not appear for his deposition, that neither plaintiffs nor their attorneys would appear for any further depositions, and that plaintiffs would voluntarily dismiss the complaint. App. A3-A4, B4. On May 15, 1984, plaintiffs filed a notice purporting to dismiss their action without prejudice pursuant to Fed. R. Civ. P. 41(a)(1), maintaining that no court approval was necessary. App. A4, B4. One respondent objected on the ground that Rule 41(a)(2), Fed. R. Civ. P. 23(e) and Central District Local Rule 18.5 required court approval before a putative class action could be dismissed. App. A4, B4.

On May 24, 1984, plaintiffs filed a motion pursuant to Rule 41(a)(2) seeking court approval of dismissal of the

entire action, both class claims and individual claims, *without prejudice* — i.e., preserving their right to sue respondents again if they chose to do so.[5] App. A4, B4. In response, respondents moved for imposition of conditions on any such dismissal: attorneys' fees and costs for their defense to the extent those fees were for work which would not be useful if plaintiffs refiled any claims. Respondents also sought sanctions under Rule 11 based on Alioto having filed the class action complaint without the required reasonable inquiry into the facts. App. at A4, B4.

Unioil and Richards (through newly retained counsel) thereupon withdrew their motion seeking court approval of dismissal of their individual claims. App. A4, B4. Directly contrary to Alioto's assertion, Alioto Pet. at 27, Unioil and Richards took no further action in the case following the district court's Rule 41(a)(2) and Rule 11 rulings. Their individual claims were subsequently dismissed with prejudice for failure to prosecute. App. A5.

E. The Decisions Below.

Judge Rymer — unanimously affirmed by the Ninth Circuit — ruled that Alioto had violated Rule 11 by, among other actions, failing to conduct the required "reasonable inquiry" into the facts and, as a result, filing a complaint which, as to the critical class action allegations, was not "well grounded in fact." App. at A4-A5, A12-A14, B7-B10, C1-C5. As Judge Rymer concluded:

---

[5]Alioto fails to mention that plaintiffs attempted to dismiss their claims without prejudice and without court approval before filing their Rule 41(a)(2) motion. Alioto likewise fails to specify that the only dismissal ever sought below was a dismissal *without* prejudice. *See, e.g.*, Alioto Pet. at 9.

(1) Alioto had failed "so much as to consult with one of his clients [Zelezny] before bringing a class action in part in his name." App. B7; *see* App. A3, A12.

(2) Had Alioto consulted with Zelezny, "that consultation would or should have readily disclosed that . . . [Zelezny's] experience was contrary to that about which the class was to complain." App. B7; *see* App. A13. Alioto's failure to consult with Zelezny was critical not only because it led Alioto to file a complaint which made factual allegations unsupported in fact, but also because Zelezny was the *only* putative class representative arguably independent from Unioil's management. App. B8; *see* App. A2-A3, A12.

(3) Had Alioto reasonably inquired into the facts — by, for example, conducting any follow-up inquiry regarding the Wall Street Journal article during the one month period between announcing the lawsuit and filing the complaint — it would have realized, as would any reasonably competent business attorney, the conflict inherent in undertaking simultaneous representation of Unioil and its management on the one hand, and a putative class of Unioil shareholders with possible claims against Unioil and its management on the other hand. App. B8, C3-C4, A12, A14.

As Judge Rymer explained:

> [T]here is no substantial evidence to show that plaintiffs' counsel made any reasonable inquiry to determine whether the shareholder class action claims were well-grounded in fact . . . . There was ample time for investigation, but Alioto never discussed the claim he asserted for Zelezny in behalf of the class with him. The importance of doing so is manifest because he [Zelezny] was the only named shareholder with the appearance of independence

> from Unioil. There is no showing that Alioto relied on Barton's having done so, or that Barton did anything more than simply solicit Zelezny as a plaintiff and determine in a cursory way that he had made transactions in Unioil stock. It is implausible that counsel as experienced as Alioto would not have perceived the conflict of interest inherent in representing Unioil and Richards and their purporting to represent Unioil shareholders; or the inappropriateness of Zelezny's serving as a representative plaintiff when his view of the facts *contradicted* those upon which the complaint proceeds.

App. B8 (emphasis in original). *See* App. A2-A3, A12-A14.

As Rule 11 sanctions, Judge Rymer awarded respondents their reasonable attorneys' fees and costs in defending against plaintiffs' claims, and in seeking sanctions (but not for establishing the amount of the sanctions). App. A5, B11, C6. After the filing of detailed documentation and after lengthy proceedings before the magistrate, the district court, adopting the magistrate's findings, set the amount of sanctions awarded against Alioto at $294,141.10. App. A5; Barton App. D3.

Separately and independently, Judge Rymer also granted plaintiffs' motion to dismiss their class action and certain individual claims without prejudice. Under Rule 41(a)(2), the district court imposed as a condition to dismissal without prejudice of the class action claims that plaintiffs and their counsel pay respondents their reasonable costs and expenses (including attorneys' fees) relating to defending the class action allegations — fees for work which would not be useful if and when plaintiffs refiled their claims. App. B11. Again adopting the magistrate's findings, the district court fixed the amount of conditions at $165,774.84. App. A5; Barton App. D3. To

avoid double recovery by respondents under Rules 11 and 41(a)(2), the district court provided that any amounts actually paid to respondents in conditions would reduce the amount Alioto was required to pay in Rule 11 sanctions. App. A5, B11; Barton App. D3-D4.

As the Ninth Circuit found, plaintiffs did not, in response to the Rule 41(a)(2) conditions, elect to forego the conditions by withdrawing their motion for dismissal and pursuing their claims, or by instead taking a dismissal with prejudice. Rather, with full knowledge of their option to withdraw their motion and avoid the conditions, plaintiffs accepted the conditions. App. A6-A7.

On appeal, the Ninth Circuit unanimously affirmed the award of Rule 11 sanctions. App. A10-A16. The Ninth Circuit dismissed the appeal from the Rule 41(a)(2) conditions, unanimously ruling the matter not appealable. App. A5-A10. A petition for rehearing and/or rehearing *en banc* was subsequently denied. App. D1-D2.

SUMMARY OF REASONS FOR DENYING THE WRITS

Under the standards set forth in this Court's Rule 17, neither the imposition of Rule 11 sanctions, for which review is sought in No. 86-1918, nor the Ninth Circuit's ruling that the Rule 41(a)(2) conditions are not appealable, for which review is sought in No. 86-1894 and No. 86-1918, merits review by certiorari.

A. Certiorari Should Be Denied In No. 86-1918 As To The Rule 11 Sanctions.

The award of Rule 11 sanctions does not merit review because it raises no important questions of federal law. To the contrary, the award rests on a well-established and wholly non-controversial component of Rule 11: an attorney's obligation, before signing a pleading, to conduct a

reasonable inquiry to determine that the pleading is well-grounded in fact. As this case demonstrates, application of this prong of Rule 11 is almost wholly fact-based, and there is no warrant for this Court to review the district court's factual findings, unanimously affirmed by the Ninth Circuit, which justified sanctions here. *See* Section A.1 below.

To justify review, petitioners attempt to construct conflicts among the circuits on various issues regarding application of Rule 11. But there is no conflict on the law applicable to the "well grounded in fact" prong of Rule 11. The putative conflicts both do not exist and, even if they did, are wholly irrelevant to this case. *See* Section A.2 below.

B. Certiorari Should Be Denied In No. 86-1894 And No. 86-1918 As To The Rule 41(a)(2) Conditions.

The Ninth Circuit's ruling that the imposition of Rule 41(a)(2) conditions on plaintiffs' dismissal of their claims without prejudice is not appealable does not warrant review by this Court.

No important question of federal law is raised by the non-appealability ruling. Petitioners have not been deprived of any right of review, because: (1) as the Ninth Circuit found, petitioners below acquiesced in the Rule 41(a)(2) conditions when, with knowledge of their option to avoid the conditions by withdrawing their motion for voluntary dismissal, they elected to accept the conditions; and (2) the Ninth Circuit explicitly recognized petitioners' right to seek review by way of petition for writ of mandamus. App. A6-A7, A10. Moreover, in affirming the Rule 11 sanctions, the Ninth Circuit did not, contrary to petitioners' argument, somehow necessarily pass on the validity of the Rule 41(a)(2) conditions. Rather, the

sanctions and conditions were independent, with Alioto required to pay the full amount in Rule 11 sanctions regardless of the validity of the conditions. App. A5, B11; Barton App. D3. *See* Section B.1 below.

Nor does the non-appealability ruling create a conflict among the circuits relevant to this case. The circuits agree that imposition of attorneys' fees conditions under Rule 41(a)(2) is generally not appealable. And while the Fifth Circuit may permit an appeal if a plaintiff has not acquiesced in the conditions and the conditions are "clearly" or "patently unreasonable," the Ninth Circuit recognizes that review may be had under such circumstances by way of petition for writ of mandamus. No circuit would permit review under the circumstances of this case, where plaintiffs did acquiesce and the attorneys' fees conditions are wholly reasonable. *See* Section B.2 below.

REASONS FOR DENYING THE WRITS

A. REVIEW SHOULD BE DENIED IN NO. 86-1918 BECAUSE THE RULE 11 SANCTIONS INVOLVE FACT-BASED APPLICATION OF WELL-SETTLED LAW WHICH RAISES NO IMPORTANT QUESTIONS OF FEDERAL LAW AND AS TO WHICH THERE IS NO CONFLICT AMONG THE CIRCUITS.

1. The Rule 11 sanctions involve fact-based application of well-settled law raising no important questions of federal law.

Rule 11 unambiguously requires an attorney, before filing a pleading, to engage in a "reasonable inquiry" to insure that the pleading is "well grounded in fact." As the Rule states:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record .... The signature of an attorney ... constitutes a certificate ... that the signer has read the pleading, motion, or other paper; that *to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact* and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(Emphasis added.)

The circuits are in agreement both as to this requirement, and as to its independence from the additional Rule 11 obligations — *not* at issue here — to investigate whether a pleading is warranted by existing law and to refrain from interposing pleadings or other papers for improper purposes. *See, e.g., Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1175 (D.C. Cir. 1985) ("*Westmoreland*"); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986) ("*Zaldivar*"). Along with the Ninth Circuit here, other circuits recognize that Rule 11 sanctions may be awarded based entirely on the "well grounded in fact" requirement. *See Elliott v. Perez*, 751 F.2d 1472, 1480-81 (5th Cir. 1985); *Albright v. Upjohn Co.*, 788 F.2d 1217, 1221 (6th Cir. 1986) ("*Albright*"); *Frazier v. Cast*, 771 F.2d 259, 263 (7th Cir. 1985) ("*Frazier*").

Alioto nowhere demonstrates that the "well grounded in fact" clause of Rule 11 has generated any issues of law meriting this Court's attention. To the contrary, as this case demonstrates, application of this clause of Rule 11 is of necessity fact-based, and will always rest on the district court's findings of fact regarding the objective rea-

sonableness of an attorney's pre-filing inquiry, and the bona fides of the relevant pleading.

Absent egregious error, this Court will not review factual findings by a district court that have been upheld by a circuit court. *United States v. Doe*, 465 U.S. 605, 613-14 (1984); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). Thus, there is no warrant for this Court to review Judge Rymer's findings of fact, unanimously affirmed by the Ninth Circuit, that Alioto's pre-filing inquiry was not the "reasonable inquiry" required by Rule 11. App. A2-A3, A12-A14, B3, B5, B7-B10. Nor is there any warrant to review Judge Rymer's findings of fact, unanimously affirmed by the Ninth Circuit, that Alioto's failure reasonably to inquire resulted in it filing a complaint the class action allegations of which were not "well grounded in fact." App. A3-A4, A12-A14, B4-B5, B7-B9.[6]

---

[6]Alioto also argues that the amount of sanctions awarded was excessive. Alioto Pet. at 18-19. The amount of sanctions is inappropriate for review by this Court because it is entirely fact-based. "The [district] court . . . retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted." Advisory Committee Notes to Rule 11. In this case, the amount of sanctions was only fixed following painstaking analysis by the district court, assisted by the magistrate. Respondents submitted declarations, accompanied by detailed time records, demonstrating that the fees sought were reasonable and non-duplicative. The magistrate held two separate hearings on the fees to be awarded, and issued formal findings on the issue which were adopted by the district court. *See* App. A16; Barton App. D1-D4. As the Ninth Circuit found, in addition to the fact that "the district court determined the amount after careful proceedings in which Alioto fully participated," App. A16, the award of fees was not excessive "in light of the massive liability that the complaint filed by Alioto threatened to impose upon multiple defendants." *Id.* There is no warrant for this Court to review the Ninth Circuit's ruling that the amount of Rule 11 sanctions imposed by the district court was not an abuse of discretion. App. A11, A16.

Alioto nonetheless attempts to manufacture an important issue of federal law by asserting that to violate Rule 11, a pleading must be found to be wholly "frivolous" or in furtherance of an improper purpose. Alioto Pet. at 12. Rule 11 says no such thing, and as the Advisory Committee Notes expressly state, amended Rule 11 "stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule." Nor does the case law so construe the Rule: the term "frivolous" is used either as a shorthand term to encompass Rule 11's three separate commands — "well grounded in fact," "warranted by existing law" and not interposed for an improper purpose, *see, e.g., Zaldivar*, 780 F.2d at 831 & n.7 — or to deal with the quite separate problem, not at issue here, of when an attorney may be sanctioned under the "warranted by existing law" clause of Rule 11. Indeed, all of the cases cited by Alioto involving the so-called "frivolousness" standard, *see* Alioto Pet. at 11-12 n.1, involve the "warranted by existing law" clause of Rule 11. None denies a lawyer's independent obligation under the Rule to reasonably inquire into whether a pleading is "well grounded in fact." *See, e.g., Westmoreland*, 770 F.2d at 1174.

Alioto also asserts three general controversies about the policy implications of judicial application of Rule 11. If these controversies exist, they have no relevance here.

First, Alioto argues that Rule 11 may chill effective advocacy. Alioto Pet. at 21-23, 26. But the "well grounded in fact" clause of Rule 11 — unlike the "warranted by existing law" clause — carries no potential for chilling advocacy. It merely requires adequate factual investigation prior to assertion of claims. Not surprisingly, all of the cases cited by Alioto which discuss Rule 11's potential

"chilling effects" were decided under the Rule's separate "warranted by existing law" clause.[7]

Second, Alioto argues that the imposition of Rule 11 sanctions wrongfully penalized its corrective action. Alioto Pet. at 19-21. But this case does *not* raise any issue of whether corrective action may limit imposition of Rule 11 sanctions. Alioto simply mischaracterizes the grounds for the award of sanctions by claiming that "the court concluded, *based on the voluntary dismissal*, that the class aspects of the complaint were nonmeritorious when it was filed." *Id.* at 15 (emphasis in original). Sanctions were imposed because of Alioto's failure to conduct a reasonable inquiry before filing the complaint, which resulted in the filing of allegations not "well grounded in fact," not because of the motion for voluntary dismissal (which in any event was for dismissal *without* prejudice). Moreover, as Judge Rymer expressly found, Alioto did not take any corrective action. Its actions were the opposite of corrective, and included: (1) an improper attempt to disengage without cause from class discovery; (2) an improper attempt to dismiss the class allegations without court approval; and (3) an effort to dismiss the class allegations *without* prejudice. App. A3-A5, B3-B7, B9-B10, C1-C3, C5-C6.[8]

---

[7]The commentary recognizes that the "well grounded in fact" clause has the potential to chill advocacy *only* if interpreted to require attorneys, prior to filing claims, to research facts that cannot be known without extensive discovery prior to the filing of a complaint. *See, e.g.*, Nelkin, *Sanctions Under Amended Rule 11 — Some "Chilling Problems" in the Struggle Between Compensation and Punishment*, 74 Geo. L. J. 1313, 1339-41 (1986) (cited in Alioto Pet. at 22-23). This case did not impose any such requirement.

[8]Alioto cites two Fifth Circuit cases for the proposition that voluntary dismissals of claims preclude Rule 11 sanctions. Alioto Pet. at 19-20, citing *Thomas v. Capital Securities Services, Inc.*, 812 F.2d 984 (5th Cir. 1987), and *Southern Leasing Partners, Ltd. v. McMullan*,

Finally, Alioto argues that the Rule 11 sanctions will serve their deterrent purpose only if imposed following a warning to the offending lawyer. Alioto Pet. at 20-21. The Rule contains no such requirement.[9] Moreover, this case does not raise the notice issue: with regard to its "well grounded in fact" requirement, the Rule is clear, precise and plainly sufficient to have put Alioto on notice. Sophisticated class action attorneys — like Alioto, App. A12, B5, B8 — should hardly need to be warned that, before filing a major class action complaint, they must take steps to insure that critical shareholder class action allegations are factually accurate with regard to the named class representative, and to investigate, in the face of a clear potential conflict of interest, to insure that a named shareholder class representative is both independent from corporate management and can satisfy the requirements of Rule 23(a). App. A12-A14, B8.[10]

---

801 F.2d 783 (5th Cir. 1986). But the cases do not so hold. Rather, they stand for the proposition that the duty to continually review and reevaluate the adequacy of a pleading "*originally supported by an adequate inquiry*" is met if an attorney voluntarily dismisses *with prejudice* what turns out to be a groundless claim. *Thomas,* 812 F.2d at 988-89 (emphasis added); *see also Southern Leasing,* 801 F.2d at 788. In this case, there was no adequate pre-filing inquiry, and Alioto only sought dismissal of the relevant claims without prejudice.

[9]The Advisory Committee Notes to Rule 11 themselves reject any absolute "warning" requirement, leaving the timing of sanctions to the discretion of the district court. "The time when sanctions are to be imposed rests in the discretion of the trial judge." Alioto's reliance on *In re Matter of Yagman,* 796 F.2d 1165, *rehearing denied and amended,* 803 F.2d 1085 (9th Cir. 1986), *see* Alioto Pet. at 20, as establishing a warning requirement is misplaced. *Yagman* recognizes that in cases involving the "well grounded in fact" clause of Rule 11, it may in some circumstances be impractical to require the court to give early notice that sanctions might be imposed. 796 F.2d at 1183.

[10]Nor, as the record reflects, would any warning to Alioto here have had any effect. As the district court found, Alioto persisted in failing

2. There is no conflict among the circuits on any Rule 11 issue in this case.

To justify review, Alioto identifies six purported conflicts among the circuits on Rule 11 issues which, it asserts, are raised by this case. Alioto Pet. at 24-25. All are either illusory or irrelevant to this case, or both.

First, Alioto asserts a conflict in that some circuits ostensibly still apply the "bad faith standard," which governed Rule 11 cases prior to its amendment in 1983, rather than the post-amendment "objective standard." Alioto Pet. at 24. The issue is irrelevant: the Ninth Circuit here applied the proper objective standard. *See* App. A11, B8. And in fact, all circuits now apply that standard. *See, e.g., Eastway Construction Co. v. City of New York*, 762 F.2d 243, 253-54 (2d Cir. 1985) ("*Eastway*"); *Lieb v. Topstone Industries*, 788 F.2d 151, 157 (3d Cir. 1986) ("*Lieb*"); *Stevens v. Lawyers Mutual Liability Insurance Co.*, 789 F.2d 1056, 1060 (4th Cir. 1986) ("*Stevens*"); *Robinson v. National Cash Register*, 808 F.2d 1119, 1127 (5th Cir. 1987) ("*Robinson*"); *Albright*, 788 F.2d at 1221; *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 205 (7th Cir. 1985); *Zaldivar*, 780 F.2d at 829; *Westmoreland*, 770 F.2d at 1177.[11]

---

to take corrective action, instead compounding his misconduct. App. A3-A5, B3-B-5, B7, B9-B10, C1-C3, C5-C6. Moreover, Alioto to this day denies any wrongdoing.

[11]The cases cited by Alioto do not demonstrate the contrary. *Suslick v. Rothschild Securities Corp.*, 741 F.2d 1000 (7th Cir. 1984), was decided under the pre-amendment Rule 11. *See Frazier*, 771 F.2d at 265 n.4. In *McLaughlin v. Bradlee*, 602 F. Supp. 1412 (D.D.C. 1985), *aff'd*, 803 F.2d 1197 (D.C. Cir. 1986), the district court opined that the amended version of Rule 11 might not require bad faith, but did not reach the issue because it found that bad faith did exist in that case. 602 F. Supp. at 1417 n.6. As *Westmoreland* indicates, the District of Columbia Circuit now applies the objective standard.

Second, Alioto asserts a conflict with respect to the standard of review in Rule 11 cases. Alioto Pet. at 24. This purported conflict is irrelevant, because (even by Alioto's own account, *id.*) in this case the Ninth Circuit applied the most searching standard of review. App. A11. Moreover, there is no conflict: the circuits apply the same standard of review. *See Robinson*, 808 F.2d at 1126 & nn. 12, 13 (explaining the harmony among the circuits; apparent differences in standards reflect only refinements in the level of analysis).

Third, Alioto asserts a conflict over whether imposition of Rule 11 sanctions is mandatory. Alioto Pet. at 24. There is no conflict: the circuits agree that Rule 11 mandates the imposition of sanctions whenever a violation is found, but allow the district courts substantial discretion to determine the nature and extent of the sanctions. *See, e.g., Eastway*, 762 F.2d at 254 n.7; *Lieb*, 788 F.2d at 157; *Robinson*, 808 F.2d at 1130-31; *Albright*, 788 F.2d at 1222; *Zaldivar*, 780 F.2d at 831; *Westmoreland*, 770 F.2d at 1174. Indeed, the language of Rule 11 unambiguously so requires: "the court . . . shall impose . . . an appropriate sanction."[12]

Fourth, Alioto asserts a conflict over whether Rule 11 warrants imposition of sanctions for attorneys' ethical transgressions. Alioto Pet. at 25. This purported conflict is irrelevant because Alioto was not here sanctioned for violation of ethical obligations. Rather, Alioto was sanctioned for failing so much as to interview Zelezny and, as the Ninth Circuit stated, for violation of its Rule 11 "duty . . . to conduct a reasonable inquiry into whether [it] . . .

---

[12]Alioto cites *Lieb* as to the contrary. But as *Lieb* stated: "The use of 'shall' [in amended Rule 11] was deliberate and considered . . . . Although trial judges still retain substantial discretion, its exercise is directed more to the nature and extent of sanctions than to initial imposition." 788 F.2d at 157, citing *Westmoreland*, 770 F.2d at 1174.

should bring the class claims in the face of the potential conflict of interest." App. A14; *see* App. B8. Indeed, the Ninth Circuit's position on this issue is favorable to Alioto: in *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1539 (9th Cir. 1986), *rehearing and rehearing en banc denied*, 809 F.2d 584 (9th Cir. 1987) ("*Golden Eagle*"), the Ninth Circuit held that Rule 11 does not require "courts to enforce ethical standards of advocacy *beyond the terms of the rule itself*" (emphasis added). This case follows that rule. Moreover, there is no conflict: while Alioto cites *Blackwell v. Department of Offender Rehabilitation*, 807 F.2d 914 (11th Cir. 1987), the Eleventh Circuit there did not hold that lawyers may be sanctioned under Rule 11 on the basis of ethical standards drawn from beyond the rule itself.

Fifth, Alioto correctly notes that there may be a conflict on whether Rule 11 imposes a continuing obligation to refine papers originally properly filed in light of new circumstances. Alioto Pet. at 25. *Compare Thomas v. Capital Security Services, Inc.*, 812 F.2d 984, 988 & n.2 (5th Cir. 1987) (there is such an obligation) *with Oliveri v. Thompson*, 803 F.2d 1265, 1274-75 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1373 (1987) ("*Oliveri*") (there is no such obligation). However, this possible conflict is irrelevant: Rule 11 sanctions were imposed here not based on Alioto's failure to correct a pleading originally filed in compliance with the Rule, but rather on its filing of a complaint which was never in compliance with the Rule.

Finally, Alioto contends there is a conflict on the issue of whether "an attorney can be sanctioned where a *portion* of the pleading is nonfrivolous." Alioto Pet. at 25 (emphasis in original). In fact, the circuits agree that Rule 11 sanctions may be appropriate even if part of a pleading has merit. *Quiros v. Hernandez Colon*, 800 F.2d 1, 2-3 (1st Cir. 1986); *Oliveri*, 803 F.2d at 1280; *Albright*, 788 F.2d at

1220-21. Indeed, Alioto concedes there is no conflict among the circuits, because the only purportedly contrary case it cites, *Golden Eagle*, is from the Ninth Circuit.[13]

Certiorari should be denied on the Rule 11 issue in No. 86-1918.

B. REVIEW SHOULD BE DENIED IN NO. 86-1894 AND NO. 86-1918 BECAUSE THE RULING THAT THE RULE 41(a)(2) CONDITIONS IN THIS CASE ARE NOT APPEALABLE RAISES NO IMPORTANT QUESTIONS OF FEDERAL LAW AND INVOLVES NO CONFLICT AMONG THE CIRCUITS.

The Ninth Circuit's ruling that the Rule 41(a)(2) conditions here are not appealable does not merit review by this Court: it involves no important issues of federal law, and is not a matter on which there is a conflict among the circuits relevant to this case.

---

[13]An intra-circuit conflict is not a ground for review by this Court. *See* Rule 17.1. Moreover, in denying petitions for rehearing *en banc* in both this case and in *Golden Eagle* — the purportedly conflicting case cited by Alioto, *see* Alioto Pet. at 25 — the Ninth Circuit properly recognized that the two cases are not in conflict. In *Golden Eagle*, which unlike this case involved the "warranted by existing law" clause of Rule 11, the Ninth Circuit drew a distinction for Rule 11 purposes between pleadings, motions and papers on the one hand, and the arguments supporting pleadings, motions and papers on the other hand. *Golden Eagle* held that Rule 11 permits imposition of sanctions, in the context of motions, only where the motion itself is not warranted by existing law, not where one of the arguments advanced in support of the motion is unwarranted. 801 F.2d at 1540. *Golden Eagle* did not involve, as does this case, the "well grounded in fact" clause of Rule 11; nor does it hold or suggest that Rule 11 sanctions are inappropriate where a portion of a pleading, rather than merely a portion of the supporting argument, is asserted in violation of the Rule. *Id.*

Contrary to petitioners' argument, *see* Alioto Pet. at 27, Barton Pet. at 13, the Rule 41(a)(2) conditions imposed here are neither extraordinary nor unusual. Rule 41(a)(2) provides, in relevant part, that "an action shall not be dismissed at the plaintiff's instance save upon order of the court and *upon such terms and conditions as the court deems proper.*" (Emphasis added.) One condition frequently imposed where, as here, plaintiff seeks a dismissal without prejudice — *i.e.,* where plaintiff seeks to deprive defendant of an adjudication on the merits and preserve its option to sue defendant again — is to condition the dismissal upon plaintiff's payment of the defendant's costs and attorneys' fees. The condition is imposed without regard to plaintiff's or its counsel's good or bad faith, the merits of the pleadings, or any conduct or misconduct of counsel. Fees are awarded to compensate defendants for the work rendered useless by the denial of an opportunity to obtain a favorable adjudication on the merits. *See, e.g., G.A.F. Corp. v. Transamerica Insurance Co.*, 665 F.2d 364, 367 (D.C. Cir. 1981) ("*G.A.F. Corp.*"); *McLaughlin v. Cheshire*, 676 F.2d 855, 856-57 (D.C. Cir. 1982) ("*McLaughlin*"). Plaintiffs against whom such conditions are imposed do not suffer legal prejudice because they are free to pursue their claims in another action or, if they elect not to satisfy the conditions, to withdraw their motion for voluntary dismissal. *See* App. A6-A8; *Lau v. Glendora Unified School District*, 792 F.2d 929, 930-31 (9th Cir. 1986) ("*Lau*"); *G.A.F. Corp.*, 665 F.2d at 367-68.

1. The ruling that the Rule 41(a)(2) conditions in this case are not appealable does not raise any important questions of federal law.

Petitioners argue that the Ninth Circuit's non-appealability ruling raises an important issue of federal law — indeed, a due process issue — because they ostensibly

have wrongfully been deprived of appellate review. Alioto Pet. at 27-28; Barton Pet. at 11. This argument ignores the options available to petitioners in the district court: (1) to acquiesce in the conditions by failing to withdraw their motion for voluntary dismissal; (2) to forego the conditions by withdrawing the motion and pursuing their claims; or (3) to withdraw the motion for dismissal without prejudice, take a dismissal with prejudice, and obtain review of the conditions on appeal from the dismissal with prejudice. *See* App. A6-A7; *Lau,* 792 F.2d at 930-31; *Yoffe v. Keller Industries, Inc.*, 580 F.2d 126, 131 n.13 *rehearing denied*, 582 F.2d 982, 983 (5th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979) ("*Yoffe*"). As the Ninth Circuit found, petitioners were "plainly aware of their option to withdraw the motion for voluntary dismissal," yet elected to acquiesce in the conditions by not doing so. App. A7.[14] Moreover, the Ninth Circuit explicitly recognized petitioners' right to seek review by way of a petition for writ of mandamus. App. A10.

Barton also argues that the non-appealability ruling raises an important issue of federal law because, despite the ruling, the Ninth Circuit in fact necessarily determined the propriety of the conditions by affirming the award of Rule 11 sanctions against Alioto. Barton Pet. at 11. This argument simply mischaracterizes the rulings below. The award of Rule 11 sanctions was wholly independent of the Rule 41(a)(2) conditions: whether or not

---

[14]As the Ninth Circuit noted: "In their reply memorandum opposing . . . [respondents'] request for [R]ule 41(a)(2) conditions, they [petitioners] explicitly spelled out this option, citing as authority the very District of Columbia case that *Lau* follows." App. A7. Moreover, despite their self-professed reliance on cases ostensibly holding Rule 41(a)(2) conditions appealable, *see* Alioto Pet. at 27, in that very reply memorandum petitioners cited *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976) which stated that Rule 41(a)(2) attorneys' fees conditions are *not* appealable. *Id.* at 603. *See also* note 15 below.

the conditions are valid, Alioto remains obligated to pay the full amount in Rule 11 sanctions. The district court only provided that Alioto's Rule 11 sanctions obligation would be reduced by any payments actually made by petitioners pursuant to the Rule 41(a)(2) conditions to avoid duplicative payments to respondents. *See* App. A5, B11; Barton App. D3.

2. The ruling that the Rule 41(a)(2) conditions in this case are not appealable does not involve a conflict among the circuits.

Petitioners argue that there is a conflict among the circuits on the Rule 41(a)(2) appealability issue. While there is some difference in approach among the circuits as to the mechanism, if any, by which Rule 41(a)(2) attorneys' fees conditions may be reviewed, that difference is one of form, not substance, and moreover is not relevant here. All of the circuits which have considered the issue have concluded that absent a showing of legal prejudice resulting from the conditions — a prerequisite not satisfied by conditions, as here, requiring payment of defendants' fees for work in defending claims which will not be useful if the claims are reasserted — Rule 41(a)(2) conditions are not appealable.[15] App. A10-A11; *Yoffe*, 580 F.2d at 131; *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976); *Scholl v. Felmont Oil Corp.*, 327 F.2d 697 (6th Cir. 1964); *Bowers v. St. Louis Sw. Ry. Co.*, 668 F.2d 369 (8th Cir. 1981), *cert. denied*, 456 U.S. 946 (1982).

It is true that the Fifth Circuit recognizes an exception to this rule by allowing appeals from conditions that a

---

[15]Alioto argues that it relied on *G.A.F. Corp.* and *McLaughlin* for the proposition that Rule 41(a)(2) attorneys' fees conditions are appealable. Alioto Pet. at 27. While the District of Columbia Circuit did entertain appeals involving such conditions in those cases, it did not address the appealability issue.

plaintiff pay a defendant's attorneys' fees if the amount of the fees is "clearly" or "patently unreasonable," *and* the plaintiff has not acquiesced in the conditions. *Yoffe*, 580 F.2d at 130-31. But this does not create a conflict: the Ninth Circuit also permits review under these circumstances, through a petition for writ of mandamus. App. A10. No circuit permits review where, as here, the plaintiff has acquiesced in the conditions, App. A6-A7, and the fees condition is not patently unreasonable. App. A10, A16.[16]

Certiorari should be denied in No. 86-1894 and in No. 86-1918 as to the Rule 41(a)(2) non-appealability issue.

---

[16]Contrary to petitioners' assertions, the Rule 41(a)(2) conditions here were in no sense patently unreasonable. As the Ninth Circuit found, the admittedly substantial fees incurred by respondents must be viewed in light of the massive liability threatened by plaintiffs' class action complaint. App. A16. Moreover, the district court set the amount of fees only after lengthy proceedings and formal findings by the magistrate. App. A5, B10-B11; Barton App. D1-D4; *see also* App. A16. Fees were awarded *only* for respondents' costs of defending against the claims which were dismissed without prejudice — the class action claims — and not for respondents' work in securing imposition of the conditions or in documenting the amount of fees to be awarded. App. B6, B11. *See also* note 6 above. Alioto's argument that the district court improperly awarded fees for defense work which would prove useful in respondents' defense of Unioil's and Richards' remaining individual claims (Alioto Pet. at 27-28) is not only unsupported by the record, but deliberately neglects to advise this Court that Unioil's and Richards' remaining claims were dismissed with prejudice for failure to prosecute. App. A5.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Petitions for Writs of Certiorari in No. 86-1918 and No. 86-1894 be denied.

Dated: July 24, 1987

Respectfully submitted,

C. STEPHEN HOWARD
Counsel of Record
WAYNE STEPHEN BRAVEMAN
SUSAN L. HOFFMAN
TUTTLE & TAYLOR
INCORPORATED
Attorneys for Respondent Donaldson, Lufkin & Jenrette Securities Corporation

BEN SUTER
TERRY ROSS
KEESAL, YOUNG & LOGAN
Attorneys for Respondents Shearson/American Express, Inc. and Oppenheimer & Co., Inc.

C. G. GORDON MARTIN
PAUL A. RICHLER
JUDITH K. OTAMURA-KESTER
MORGAN, LEWIS & BOCKIUS
Attorneys for Respondents E. F. Hutton & Co., Inc., Richard Jacoby and Haim Pekalis

FRANK KAPLAN
ALSCHULER, GROSSMAN & PINES
Attorneys for Respondents Kurt Feshbach and Stockbridge Partners, Inc.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 24, 1987, I served the within BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI in re: "Alioto & Alioto vs E. F. Hutton & Co., Inc." in the United States Supreme Court, October Term 1987, Nos. 86-1918 and 86-1894;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

CLERK, UNITED STATES
COURT OF APPEALS
NINTH JUDICIAL CIRCUIT
Seventh & Mission Streets
P. O. Box 547
San Francisco, California 94101

CLERK, UNITED STATES
DISTRICT COURT,
CENTRAL DISTRICT OF
CALIFORNIA for the
Hon. Pamela A. Rymer
312 N. Spring Street
Los Angeles, California 90012

JOSEPH L. ALIOTO
ALIOTO & ALIOTO
650 California Street
23rd Floor
San Francisco, California 94108

DUANE S. MUSFELT
SHARON S. CHANDLER
LEWIS, D'AMATO, BRISBOIS
& BISGAARD
601 California Street
Suite 1900
San Francisco, California 94108

ROY G. WEATHERUP
ROBERT L. KAUFMAN
HAIGHT, DICKSON, BROWN
& BONESTEEL
201 Santa Monica Boulevard
P. O. Box 680
Santa Monica, California 90406

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on July 24, 1987, at Los Angeles, California

CE CE MEDINA